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ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

of  
CUMULUS LICENSING LLC  
for Modification of  
Translator Station W256BO  
or License to Cover  
FM Translator Station W255CJ  
Atlanta GA

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)  
) Facility ID No. 148550  
)  
) File No. BPFT-20110711AEI  
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)  
) File No. BLFT-20110915ACL  
) FIN 148550

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FILED/ACCEPTED

To: The Secretary, FCC  
Attn: Chief, Audio Division, Media Bureau

OCT 12 2011

Federal Communications Commission  
Office of the Secretary

**OPPOSITION TO PETITION FOR RECONSIDERATION  
AND INFORMAL OBJECTION OF COX RADIO INC.**

Cumulus Licensing LLC ("Cumulus"), licensee of FM translator Station W255CJ (formerly W256BO), Channel 255 (98.9 MHz), Atlanta, Georgia, hereby submits this Opposition to the Petition for Reconsideration and Informal Objection ("Petition"), filed September 26, 2011, by Cox Radio, Inc. ("Cox"), licensee of full-power FM Station WSB-FM, Channel 253 (98.5 MHz), Atlanta, Georgia, Facility ID No. 73978. The Petition asks the Media Bureau to rescind its grant of Cumulus' application to modify its translator station (the "Modification Application") and to dismiss Cumulus' application for license to cover the changes (the "License Application").<sup>1</sup>

<sup>1</sup> The License Application that Cox objects to was granted by the Media Bureau on September 29, 2011. See, *Public Notice*, Broadcast Actions, Report No. 47585, released October 4, 2011. Therefore, the Petition for Reconsideration would also apply to the License Application and the Informal Objection is not necessary. See also *Public Notice*, Report No. 27587, released October 6, 2011, noting the Petition for Reconsideration applies to the license application as well.

1. Cox makes three arguments in the Petition, none of which withstands even cursory examination and which get progressively more fanciful, as will be shown. Even its claim of standing, which is based on the third, and most bizarre of its arguments, is internally flawed. In short, Cox's strategy is to set up three straw man arguments, and then knock each one down. In the process Cox credits Cumulus with, and would saddle it with the repercussions from, a litany of surreptitious intents, as well as actions it has not taken, assertions it has not claimed and knowledge it does not possess. Where Cox lacks facts to support its arguments, it fabricates conclusions and assumes the facts that would make them plausible. Where it lacks a legal basis for its conclusions, it cites law and regulation that are neither applicable nor proscriptive and simply asserts that they are both. The petition is devoid of substance and the public interest would be served by its prompt dismissal. In support hereof, the following is shown.

**I. Cumulus' Modification Application Was Not Mutually Exclusive With, Earlier-Filed Window Applications.**

2. Cox's leading argument against the Modification Application is that it was mutually exclusive ("MX") with applications filed eight years ago in the 2003 filing window for new and major changes in FM translator stations. Proceeding on this false premise, Cox argues that Cumulus is subject to statutory and regulatory requirements to submit the agreement underlying any request to dismiss one or more of the MX applications.<sup>2</sup> Specifically, Cox refers to seven applications pending in the 2003 translator filing window, which are noted in Cumulus' application.<sup>3</sup> It then asserts that

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<sup>2</sup> See, Petition at 1.

<sup>3</sup> See BPFT-20110711AEI, Engineering Statement, Exhibit E1 - Channel Study. Charles M. Anderson, Cumulus' engineering consultant, states in Exhibit E1 and in his narrative that these applications

the Bureau must rescind its grant because Cumulus failed to file agreements with the Modification Application, as required by Section 311(c) of the Communications Act and Section 73.3525 of the Commission's Rules – Straw Man Argument #1.

3. Whether intentionally or inadvertently, the mistake Cox makes is to confuse mutual exclusivity with contingency. Only applications filed in the 2003 window can achieve MX status. The Modification Application filed in 2011 cannot.<sup>4</sup> The only way it could be MX with those applications would be to have filed during the 2003 filing window. That status is not available to, nor can it be attributed to, the Modification Application. The Modification Application was, by contrast, contingent on the dismissal of the earlier-filed applications, because it could not be granted so long as those applications were still pending.

4. Cox's attempt to obfuscate the distinction between mutually exclusive and contingent applications relies on a statement that Cumulus did not make. The Petition states that "Cumulus acknowledged in its Engineering Statement that the Construction Permit Application was mutually exclusive with seven mutually-exclusive applications for new FM translators in the Atlanta Metro Market."<sup>5</sup> No such acknowledgment exists in the application.<sup>6</sup>

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would be dismissed. This was done to alert staff processing Cumulus' application that the earlier proposals would not bar grant of the application. This is standard practice of consultants and consulting engineers, as a courtesy to the Bureau staff.

<sup>4</sup> The Petition itself suggests that Cox recognizes at some level that the Cumulus application was not mutually exclusive when it describes Cumulus as "[a] third party . . . *which was not part of the initial mutual exclusivity.*" *Petition* at 5.

<sup>5</sup> *Petition* at 3.

<sup>6</sup> To bolster its argument, Cox credits Cumulus with a further statement that Cumulus did not make. The Petition states "Cumulus asserted that the Commission should process and approve the Construction

5. In sum, the Modification Application was not mutually exclusive with applications in the 2003 window. Therefore, the cited statutory and regulatory requirements applicable to mutually exclusive applications do not apply here.<sup>7</sup>

## **II. The Withdrawals of Conflicting FM Translator Applications Were Influenced By Anticipated Dismissals by the Commission.**

6. The Petition crafts a web of implied impropriety suggesting surreptitious intent on Cumulus' part in connection with the requested withdrawals of the seven MX 2003 applications. The facts are far more mundane. In reality, the applicants who withdrew their applications were influenced directly by actions taken by the Commission that signaled its intent to dismiss those applications in due course.

7. On July 12, 2011, the Commission released its *Third Further Notice of Proposed Rule Making* in the low power FM and FM translator rule making dockets.<sup>8</sup> In the NPRM, the FCC identified "spectrum limited" communities where pending FM translator applications should be dismissed *en masse* to make way for LPFM stations. Appendix A to the document lists the "spectrum limited" communities. Atlanta, Georgia

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Permit Applications [*sic*] because all seven MX Translator Applications 'will be dismissed.'" *Id.* As discussed above, Cumulus made no such statement.

<sup>7</sup> Cox's further assertion that Cumulus acted inappropriately as a "white knight" is misplaced. The Commission has defined a "white-knight" settlement as one where 'a third party 'steps into the shoes' of the surviving applicant and, upon grant of the construction permit, is immediately the permittee of the new station " *Hammock Environmental and Educational Community Services Application for NCE FM Construction Permit*, 25 FCC Rcd 12804 (2010). The instant case involves no stepping into any applicant's shoes and no grant of permit for a new station. Indeed, the *Rebecca Radio of Marco* case cited in the Petition acknowledges that "it is not inconceivable for a bona fide applicant to decide for entirely legitimate reasons to abandon its efforts to secure a construction permit at any time during the proceeding."

<sup>8</sup> See, *Third Further Notice of Proposed Rule Making* in the Matter of Creation of A Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations, MM Docket No 99-25 and MB Docket No 07-172, FCC 11-105, released July 12, 2011 ("NPRM" or "*Third Further Notice*").

is one such community and the Commission proposes to dismiss all 31 pending FM translator applications, including the seven applications noted in the Engineering Exhibit to the Modification Application.<sup>9</sup>

### **III. The Current Freeze on FM Translator Applications Does Not Impact Cumulus' Modification Application.**

8. Cox's next argument in essence seeks reversal of years of Bureau decisions involving modifications of W255CJ, long since granted and final, that were proposed by the prior licensee of the station. This is Straw Man Argument #2, which builds on Straw Man Argument #1. Even though Cox did not object to any of the previous modifications of this translator filed by the previous licensee, in a creative feat of turning back the clock, Cox argues that Cumulus should be held responsible now for moves that would have violated, for whatever reason, the recently instituted freeze, if the freeze had been in effect then.<sup>10</sup> Such a reach-back is unprecedented and Cox cites no case to support it. The Bureau must give this novel argument no weight. Indeed, not even Cox suggests it is a reason to rescind the grant. The Modification Application, in fact, proposed a channel change and a power increase at the currently licensed site. It is the only modification application filed by Cumulus, which had purchased the translator only three and one-half months prior to filing the Modification Application.<sup>11</sup> Cox does not claim that the Modification Application violated the freeze, which went into effect

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<sup>9</sup> *Id.*, Appendix A.

<sup>10</sup> Though not specifically stated, Cox seems to assume that Cumulus had prior knowledge of the earlier-filed applications. To put any such assumption to rest, Attachment A hereto is the Declaration of Cumulus Vice President Richard S. Denning stating that neither he nor officials of the company had knowledge of the modification history of the translator station when Cumulus acquired the license.

<sup>11</sup> See, BALFT-2010723AJD, consummated March 24, 2011.

after the application was filed. Cox no doubt realized that the freeze does not apply to a power increase and channel change for a translator station already located in the Atlanta market. That realization, however, did not deter Cox from asserting that the Modification Application violated the freeze, though it did force it to concoct a novel and unprecedented argument to support the assertion.

9       What is of greater relevance to the purpose underlying the freeze is the impact of the translator modification on the availability of spectrum for new LPFM stations. Cox made no attempt to show that the grant of the Modification Application would have any impact on the availability of spectrum for new LPFM stations in the Atlanta market. Thus grant of the permit and license was in no way “inconsistent with this processing freeze.”<sup>12</sup>

#### **IV.    Rescission of the Grant is Not Justified Based on Interference Received by the Translator.**

10.     Cox states it has standing to file the Petition for Reconsideration “because the modified facilities will cause interference to Cox’s station WSB-FM....”<sup>13</sup> However, nowhere in the Petition for Reconsideration does Cox allege interference *to its station*. Instead Cox asserts that there will be “massive interference” from the *planned* digital power increase for Station WSB-FM *to* Station W255CJ. Cox is either confused or has created another bizarre argument -- Straw Man Argument #3 -- as a pretense to file the Petition for Reconsideration. If its station will cause interference to the translator once the digital power increase occurs, Cox’s interests are not affected and such caused

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<sup>12</sup>       *Petition* at 6.

<sup>13</sup>       *Petition* at Note 3.

interference does not, in any event, confer standing. It is merely a gratuitous warning to Cumulus that there may be interference affecting the translator sometime in the future. Thus, the Petition for Reconsideration can be dismissed on this ground alone.<sup>14</sup>

11. In addition, Cox recognizes that it should have participated in the proceeding during the nearly two month period that the Modification Application was pending.<sup>15</sup> In response, Cox creates another absurd premise stating that it needed to wait until the dismissals were actually filed rather than offer its comments in anticipation of the dismissals. Cox cites no basis for having failed to file earlier. The dismissals were not a prerequisite for any of the arguments advanced in the Petition. As stated above, the dismissals did not create an MX relationship with the Modification Application. The dismissals did not cause Cox to believe that the Modification Application violated the freeze that was announced on July 12, 2011. Finally the dismissals did not cause Cox to be concerned with interference that it believes it will cause to the translator. These are frivolous reasons for not having participated earlier. Thus there are ample grounds for the Media Bureau to dismiss the Petition for Reconsideration based on procedural reasons alone.

12. Moreover, Cumulus does not believe there will be massive interference to its translator from WSB-FM's later-proposed maximized IBOC operations. The attached Engineering Statement argues that there is no basis for Cox's speculation about predicted

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<sup>14</sup> See 47 C.F.R. §1.106(b) (1) (requiring that the petitioner's interests have been adversely affected by the action taken by the Commission).

<sup>15</sup> *Id.* (requiring that any petitioner not a party to the proceeding show good reason why it was not possible for him to participate in the earlier stages of the proceeding).

interference to analog indoor receivers.<sup>16</sup> In this regard, Cox makes the point that Cumulus will be better off returning to its previous operation on Channel 256, with less power. If Cox believes that the W256BO facilities would offer better service and serve more listeners than the W255CJ facilities once the Station WSB-FM digital power increase occurs, then Cox needs to explain how its interests are affected and why it would not make more sense for Cox to support than to oppose the W255CJ operation.

## **V. Conclusion**

13. Cox's Petition for Reconsideration is manifestly deficient both procedurally and substantively. Cox has not shown that it has standing to file and has also failed to show why it could not have participated earlier in the proceeding. Cox has created straw arguments to provide a basis for its assertions, which do not hold up under scrutiny. First, its premise that the Modification Application is mutually exclusive with earlier-filed applications – because, allegedly, Cumulus said it was -- is demonstrably false. There is no MX relationship and Cox's premise fails. Second, its assertion that the current freeze applies because a prior licensee would have violated the freeze had it been in effect sometime prior to the date that it actually took effect is, again, absurd and Cox must realize that the freeze does not apply to the Modification Application. The third, final and most bizarre assertion has even less substance than the others. Cox's alleged concern that Cumulus' translator might experience interference did not need to be expressed in an otherwise meritless Petition for Reconsideration. A simple letter or email directed to Cumulus would have sufficed.

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<sup>16</sup> See attached Engineering Statement.



14. Accordingly, for the foregoing reasons, Cumulus urges the Commission to dismiss the Petition for Reconsideration.

Respectfully submitted,

CUMULUS LICENSING LLC

By:   
Mark N. Lipp  
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1776 K Street NW  
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202-719-7000

Its Attorneys

October 12, 2011

## DECLARATION OF RICHARD S. DENNING

I, Richard S. Denning, hereby declare and state as follows:

I am Senior Vice President, Secretary and General Counsel of Cumulus Licensing LLC ("Cumulus"), which is the licensee of FM translator Station W255CJ, Atlanta, Georgia (the "Translator Station").

Cumulus acquired the Translator Station license from Edgewater Broadcasting, Inc. ("Edgewater") on March 24, 2011 pursuant to prior FCC consent in FCC File No. BALFT-20100723ADJ. At the closing, Edgewater held and transferred to Cumulus a construction permit to operate the Translator Station at geographic coordinates 38-48-26N 84-20-22W with 99 watts ERP on Channel 256. Cumulus filed the covering license application, which was granted June 21, 2011. Cumulus subsequently sought and was granted a permit to increase ERP to 250 watts at the same coordinates on Channel 255. A license for the channel change and increased power was granted September 29, 2011.

Neither I nor, to the best of my knowledge, any Cumulus principal, officer or director involved in the Edgewater transaction was a party to or aware of the history of modifications of the Translator Station that were carried out by Edgewater prior to the time Cumulus acquired the license.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief and are made in good faith.

Executed on this 11<sup>th</sup> day of October, 2011.



Richard S. Denning  
Senior Vice President, Secretary and  
General Counsel of Cumulus Licensing LLC

ANALYSIS OF COX RADIO, INC.  
TECHNICAL OBJECTION TO W255CJ

The Cox Radio, Inc objection to translator Station W255CJ's operation on Channel 255 (98.9 MHz) is entirely based on predicted interference to be received by W255CJ from the planned digital operation of 2<sup>nd</sup> adjacent channel Station WSB-FM on Channel 253. This objection seems somewhat disingenuous since Cox does not claim any potential interference to its own station - WSB-FM.

In support of this "concern" about interference to W255CJ, Cox's engineering consultant cites an NPR laboratory report suggesting that interference to "indoor analog receivers" will occur. Obvious by its omission is any reference to automobile receivers which constitute the majority of radio listening. Unfortunately, it is not possible to fully evaluate the Cox showing since detailed technical parameters are not provided on the study, nor does there appear to be any reference to the software or methodology used other than referring to Longley-Rice interference predictions. Although Longley-Rice is a useful tool, its results vary widely depending on the terrain data used and the assumptions regarding receive antenna height among other parameters.

There is not unanimity of opinion among the engineering community on the validity or usefulness of the NPR lab results. To this date, there have been no widespread reports of 2<sup>nd</sup> adjacent channel interference between full power FM stations operating at digital power levels higher than -20 dBc. It would seem prudent to await for more data before jumping to such conclusions. Given the gravity of the Cox predictions, it seems that, if true, the destruction of analog reception in major northeastern markets filled with grandfathered 2<sup>nd</sup> adjacent channel stations is inevitable.

It is concluded that the Cox concerns about interference are premature and unsubstantiated.



Charles M. Anderson  
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## CERTIFICATE OF SERVICE

I, Faye Jones, hereby certify that on this 12<sup>th</sup> day of October, 2011, I caused a copy of the Opposition to Petition for Reconsideration to be served on the following:

By Email:

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